

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**MARTHA A. CARSON**  
Claimant

VS.

**SPRINT NEXTEL CORPORATION**  
Respondent

AND

**AMERICAN CASUALTY COMPANY OF  
READING, PA.**  
Insurance Carrier

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Docket No. 1,037,556

**ORDER**

Claimant appeals the June 25, 2008 Preliminary Decision of Administrative Law Judge Robert H. Foerschler (ALJ). Claimant was denied temporary total disability compensation (TTD) for the period beginning December 30, 2007, and ending March 13, 2008, inclusive. The ALJ determined that K.S.A. 44-510d(b) limited claimant's TTD to 10 percent of the scheduled weeks with a maximum of 15 weeks.

Claimant appeared by her attorney, James E. Martin of Overland Park, Kansas. Respondent and its insurance carrier appeared by their attorney, Daniel N. Allmayer of Kansas City, Missouri.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of the Preliminary Hearing held June 16, 2008, with attachment; and the documents filed of record in this matter.

**ISSUES**

1. Does the Board have jurisdiction to consider this question on appeal from a preliminary hearing?

2. If the Board does have jurisdiction to consider this matter, did the ALJ exceed his jurisdiction in construing K.S.A. 44-510d(b) to limit the payment of TTD to 10 percent of the scheduled injury weeks not to exceed 15 weeks? Are the limits contained in K.S.A. 44-510d(b) directed to apply only to amputations and intended to be in addition to the weeks allowed for permanent partial disability allowed by the schedule and not subtracted from it as with other weeks of TTD compensation?

### **FINDINGS OF FACT**

After reviewing the record compiled to date, the undersigned Board Member concludes the Preliminary Decision should remain in full force and effect and the appeal of claimant should be dismissed.

Claimant suffered an injury to her left shoulder on November 4, 2006, while lifting a tub of mail. As the result of this injury, claimant underwent three surgeries to her shoulder, including a total shoulder replacement. Respondent has paid for the medical treatment and paid TTD through December 29, 2007. TTD was then restarted as of March 14, 2008. For reasons not explained in this record, TTD was stopped December 30, 2007. Claimant, at the preliminary hearing of June 16, 2008, requested TTD for 8 weeks and 4 days [*sic*]. In her brief to the Board, claimant stated she is requesting TTD for 10.57 weeks.<sup>1</sup> At the preliminary hearing, respondent provided no reason for terminating the TTD.

The ALJ determined that because claimant's injury was a scheduled injury under K.S.A. 44-510d, claimant's TTD was limited to 10 percent of the weeks listed in the schedule or a maximum of 15 weeks. Claimant argues the ALJ misinterpreted the statute, determining the healing period language of the statute was a limit on all TTD payable when a scheduled injury is the only injury being contested. Respondent argues that the Board does not have jurisdiction to determine this matter on appeal from a preliminary hearing order, or in the alternative, argues the Preliminary Decision of the ALJ should be affirmed.

### **PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 44-534a grants the administrative law judge the authority to determine a claimant's request for temporary total disability and ongoing medical treatment at a preliminary hearing. The Board's review of preliminary hearing orders is limited to specific issues as set forth in the statute.

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<sup>1</sup> The actual number of weeks for the period of December 30, 2007, through March 13, 2008, is 10.71 weeks. The year 2008 is a leap year.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?<sup>2</sup>

Additionally, the Board may review those preliminary hearing orders where it is alleged that an administrative law judge has exceeded his or her jurisdiction or authority in providing or denying the benefits requested.<sup>3</sup>

Claimant contends the ALJ exceeded his jurisdiction in denying claimant additional TTD benefits for the period December 30, 2007, through March 13, 2008. The ALJ determined that claimant was limited to 10 percent of the scheduled weeks in K.S.A. 44-510d, with a maximum of 15 weeks. Claimant contends the ALJ erred in his interpretation of the statute.

K.S.A. 44-534a grants the administrative law judge the authority to determine disputes concerning the furnishing of TTD and medical treatment. Accordingly, the ALJ did not exceed his jurisdiction in entering the order of June 25, 2008. The Board understands claimant's frustration, but is limited, nevertheless, in its right of review at this stage of these proceedings.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.<sup>4</sup>

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<sup>2</sup> K.S.A. 44-534a(a)(2).

<sup>3</sup> K.S.A. 2007 Supp. 44-551(2)(A).

<sup>4</sup> *Allen v. Craig*, 1 Kan. App. 2d 301, 564 P.2d 552, rev. denied 221 Kan. 757 (1977); *Taber v. Taber*, 213 Kan. 453, 516 P.2d 987 (1973); *Provance v. Shawnee Mission U.S.D. No. 512*, 235 Kan. 927, 683 P.2d 902 (1984).

This Board Member finds there is no jurisdiction to hear this matter at this juncture of this claim. The Board has encountered similar frustrations dealing with TTD awards or denials in the past. But the Kansas legislature was clear in its mandate limiting the Board's jurisdiction on appeals from preliminary hearing orders.<sup>5</sup>

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>6</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

### **CONCLUSIONS**

The Board does not have jurisdiction over this issue at this stage of these proceedings. Therefore, claimant's appeal must be dismissed.

### **DECISION**

**WHEREFORE**, it is the finding, decision, and order of this Appeals Board Member that the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated June 25, 2008, remains in full force and effect, and claimant's appeal in this matter is dismissed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August, 2008.

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HONORABLE GARY M. KORTE

c: James E. Martin, Attorney for Claimant  
Daniel N. Allmayer, Attorney for Respondent and its Insurance Carrier  
Administrative Law Judge

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<sup>5</sup> *Keathley v. Brown & Brown, Inc.*, No. 1,030,660, 2007 WL 2022160 (Kan. WCAB June 29, 2007).

<sup>6</sup> K.S.A. 44-534a.